No. 15829

United States
COURT OF APPEALS
for the Ninth Circuit

ALBINA ENGINE & MACHINE WORKS, INC., a corporation,

Appellant,

vs.

AMERICAN MAIL LINE, LTD., a corporation,

Appellee.

PETITION FOR REHEARING

Appeal from the United States District Court for the District of Oregon.

MAUTZ, SOUTHER, SPAULDING, DENECKE & KINSEY,
ARNO H. DENECKE,
Attorneys for Appellant.

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TO THE HONORABLE JAMES ALGER FEE and RICHARD H. CHAMBERS, CIRCUIT JUDGES, and JAMES M. CARTER, DISTRICT JUDGE, CONSTITUTING THE COURT IN THE ORIGINAL HEARING HEREIN:

Appellant respectfully submits that this Court has substantially erred, one of said errors affects the whole field of United States Coast Guard ship inspection, and another error will cause grave uncertainty in cases involving injury to seamen; therefore, appellant requests

that a rehearing be granted and the opinion render herein be reconsidered and set aside.

I.

The Court Erred in Concluding That a Vessel Operator Can Contract to Have a Ship's Statutory Annual Inspection Partially Performed by a Private Ship Repair Yard Rather Than the Statutory Designated United States Coast Guard

Here the JAVA MAIL was in for her annual inspe tion and repairs (Tr. 198). This Court decided that A bina (the repair yard) and American Mail (the vess operator) had contracted to perform a part of the a nual inspection,—"Ascertaining if the boat bottom w stand the strain of the authorized capacity weight * * (inspection of) the gear used in lowering the boat The Court stated:

> "This court just cannot accept as a matter of la Albina's thesis that the proposition was that would furnish sand and strong arm labor to hand sand and that its only duty was to satisfy the Coa Guard inspector that it had done what he wante done."

The Court did add after these remarks:

> "For Albina it can be said the inspector's testimon tends to support the thesis."

Not only did the Coast Guard inspector testify tha it was his job, not the repair yard, to inspect the gea used in lowering the boat, but he testified that he di inspect this gear, including the hook and ring, on Apr 5, two days before the weight test, and the day befo the sand was requested (Tr. 97, 103, 105, 209).

The Albina superintendent testified that he did not intend to contract to inspect the lifeboat or davits; that that was the job of the Coast Guard inspector (Tr. 84).

American Mail's representative, O'Toole, testified he did not intend to contract for Albina to do any testing or inspecting of the lifeboat or davits.

O'Toole testified that Albina put the sand in the boat, floated it under the falls: "They (Albina) then hooked the boat onto the falls and raised it sufficiently high out of the water to hold it sufficiently long until the Coast Guard surveyor on the job was satisfied that everything was fine. During that time he would be looking at the boat, at the cables, at the hooks, at all gear pertaining to handling the lifeboat and he then, I assume, told them that everything was alright, at which time they would have refloated the boat * * *." (Tr. 204.)

O'Toole was further questioned:

> "Q. Is there anything to be done in the weight test by Albina or whoever else it is doing it, some other repair yard, other than placing the sand or whatever other weights they want to put in the boat and raising it or lowering it as the Coast Guard inspector directs?
>
> A. They have all handling of the boat." (Tr. 204.)

O'Toole further testified:

> "Q. As the Port Engineer, do you consider it the duty of the repair yard in conducting a weight test—not conducting it, but trying it for the Coast Guard—to examine the ring, for example, and the hooks to see whether or not it is possible for the

ring to become disengaged when it is resting in th water?

A. No, that is not necessarily part of their wor * * *."

Neither did the trial court find that Albina had an duty to test or inspect the lifeboat or its gear (Find. o Fact No. 2, Tr. 34). The trial court found "Defendar (Albina) was to make weight tests." This is the languag that the specifications used and which both the partie testified meant supplying of sand, putting it in an taking it out of the boat. At no place in its findings o conclusions did the trial court interpret the contract a requiring Albina to make any inspection.

The statute requires the Coast Guard to make th annual inspection (46 USCA Sec. 391) and the statut requires the Coast Guard to certify that it, and no on else, has inspected the ship, including the life-boats an that the ship is in order (46 USCA Sec. 399). The Coas Guard inspector testified it was his duty and he di make the test and inspection of the gear here involved The two contracting parties, American Mail and Albina are agreed that the contract did not require any testin or inspecting by Albina. The trial court did not find t the contrary. There just is no support of any kind fo this Court's holding that Albina did have a duty to tes and inspect this gear and it is respectfully submitte that this Court is in error in so holding. Such holdin being in error, the judgment of the trial court mus necessarily be reversed because this Court's affirmanc of indemnity was on the basis that Albina breached contractual duty to test and inspect the lifeboat.

II.

The Trial Court Erred in Deciding That American Mail Line Had no Duty to Its Sailors to Inspect the Lifeboat and This Court Erred in Concluding That Such Decision Was Not Clearly Erroneous

In an implied indemnity suit whether or not the party seeking indemnity was negligent is a relevant question, contrary to the belief of the trial court and the statement of appellees' counsel (Tr. 110, 112). Despite counsel's statement, the appellee had the trial court enter a finding:

> "Plaintiff was not negligent nor at fault for not inspecting the swivel and hook and keepers before commencing the boat drill, and was not otherwise negligent in any respect." (Finding of Fact No. 9, (Tr. 36.)

and

> "The said two men commenced actions at law in the state court, which were removed to the United States District Court for Oregon, to recover damages for their said injuries because of the unseaworthiness of said lifeboat." (Finding of Fact No. 10, Tr. 36.)

Appellant filed objections to these findings, but said objections were never passed upon and, as far as appellant knows, the trial court's illness was such that he never again took the bench after these objections were filed.

The issue, as framed by the appellee in its complaint and its contentions in the pretrial order, was, could the appellee recover indemnity for sums it had to pay the injured seamen because of the ship's *negligence?* Negli-

gence was assumed by the appellee. No contention was made that the only source of liability of American Mail was unseaworthiness. The amended complaint states:

> "The liability of plaintiff to said Benjamin E. Nelson arose under what is known as the Jones Act for failure to furnish a safe place to work and other causes actionable under said Act * * *." (Tr. 21-22.)

The plaintiff contends in the pretrial order, which was only supplemental to the pleadings:

> "That under the admiralty and maritime law *and* the Jones Act, plaintiff was liable to Nelson and Yee not only in damages, but for their maintenance and cure * * *." (Tr. 30.)

Liability under the Jones Act is for negligence. American Mail has stated it was liable to Nelson and Yee for negligence. When a party admits negligence, is not a trial court's finding that such party was not negligent erroneous?

In addition to the above, the trial court's finding of no negligence is contrary to universally established law. The trial court made "no negligence" a finding of fact. This Court proceeded as if it were a matter of fact and concluded that, being a question of fact, this Court cannot decide there was no evidence to support said finding. It is respectfully submitted that this problem cannot be decided on that basis, i.e., "* * * We are satisfied that the trial court did not have to find as a matter of law that American Mail was negligent. It could have so found, but did not."

The evidence was, and the trial court found, that American Mail did not inspect "the swivel and hook

and keepers before commencing the boat drill." (Finding of Fact No. 9, Tr. 36.) The only question left is, did American Mail have a *duty* to inspect the boat and its gear, or didn't it. This is not a matter on which a court can find either way and still not be clearly erroneous. Either American Mail had a duty to inspect or it didn't and the answer is a matter of law, not a matter within the discretion of the trier of fact.

> "Negligence is a question of law and fact. It arises from a failure to perform a legal duty and it includes two questions: first, whether a particular act has been performed or omitted. Second, whether the performance or omission of this act was a breach of a legal duty. The first question is one of fact. The second is one of law. 'The law determines the duty; the evidence shows whether the duty was performed.' " *New York and Porto Rico SS Co. v. Guanica Centrale,* 231 Fed. 820 (CCA 2nd).

Under the Jones Act, there is no room for doubt that a ship operator has a duty to its seamen to inspect ship's equipment and a failure to do so is negligence as a matter of law. The cases are voluminous for this proposition. Two from Oregon are as follows:

Carlson v. Wheeler-Hallock Co., 171 Ore. 349, 137 P.2d 1001. Here skid boards, which were used to make a temporary flooring over stowed cargo, were involved. At page 358 the court stated:

> "It does not appear, however, that it was any part of plaintiff's (sailor) duty to inspect the skid boards, *whereas it was most certainly the mate's duty.*" (Emphasis supplied.)

In *The Mercier,* 5 Fed. Supp. 511, Judge Fee, sitting as a District Judge, stated:

> "The expression 'might with reasonable care have known' applies to duty of inspection upon the part of the ship, *which is a well recognized requirement.*" (Emphasis supplied.)

The duty on the ship owner to inspect is unequivocal, the breach by American Mail is unequivocal and negligence by American Mail as a matter of law is unequivocal. This negligence bars American Mail from indemnity. Any other result would mean the defeat of the purpose for appellate courts by avoiding a decision on a legal issue by naming it a fact issue.

In summary, it is submitted that this Court erred in deciding, contrary to the testimony of all parties concerned, that Albina had a duty to test the lifeboat and its gear; and the Court further erred in concluding that the trial court's holding that American Mail was not negligent was not clearly erroneous despite the fact that appellee admitted the negligence and the issue is solely one of law.

Respectfully submitted,

MAUTZ, SOUTHER, SPAULDING, DENECKE & KINSEY,
By ARNO H. DENECKE,
Attorneys for Appellant.

STATE OF OREGON)
) ss.
County of Multnomah)

I, Arno H. Denecke, of attorneys for Petitioner do hereby certify that the foregoing petition for rehearing is well founded in my judgment and is not interposed for the purposes of delay.

ARNO H. DENECKE